

S. Schatz



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Third Millennium, Inc.

**File:** B-241286

**Date:** January 30, 1991

Len Cormier for the protester.

William S. Zanca, Esq., Strategic Defense Initiative Organization, Department of Defense, for the agency.

Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later raised allegations are untimely where not filed within 10 working days after the basis of protest is known or should have been known.

2. Agency reasonably excluded offeror from the competitive range where offeror's proposal for the first phase of a multi-phase research, development and acquisition program did not affirmatively demonstrate the required capability to perform the subsequent phases, and the proposal would require major revision in order to be made acceptable in this regard.

### DECISION

Third Millennium, Inc. (MMI) protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. SDIO84-90-R-0007, issued by the Strategic Defense Initiative Organization (SDIO), Department of Defense, for a study to evaluate the "Single Stage to Orbit" (SSTO) launch vehicle concept to be used in military space launch missions. MMI challenges the evaluation of its proposal and maintains that it should have been given the opportunity to participate in discussions with the agency to address any deficiencies in its proposal.

The protest is dismissed in part and denied in part.

The RFP advised that the agency intended to award a number of fixed-price contracts for Phase I, a 10-month research and

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development study of an overall multi-phase program to develop and launch a reusable SSTO rocket-propelled vehicle. The statement of work (SOW) provided for an initial period of 4 months for concept exploration, during which the contractor was to compare detailed alternate design concepts, including vertical takeoff and landing; horizontal takeoff and landing; and vertical takeoff and horizontal landing concepts. The contractor was to define for each concept associated critical path technologies and such performance characteristics as gross liftoff weight, payload capacity to orbit and return payload capacity, vehicle development costs, operation and maintenance costs, and manpower and other resources required for vehicle turnaround. The SOW provided that at the conclusion of the initial 4-month period the agency would undertake a concept review to evaluate each contractor's preferred concept, while the contractor would continue to refine its preferred concept and, as part of its risk reduction effort, conduct a demonstration of the critical path technologies.

The solicitation also described several follow-on phases to be solicited separately in the future, including: Phase II, the manufacture of a sub-orbital technology demonstrator (test vehicle); Phase III, the manufacture of a manned, full-scale experimental prototype; and Phase IV, the manufacture of a manned, reusable SSTO operational vehicle with aircraft-style operations capable of accomplishing the mission model. In this regard, the cover letter to the RFP warned potential offerors that "although this solicitation is primarily for the Phase I Study, offerors must have the ability to develop and launch the Technology Demonstrator and the Experimental Prototype to be considered for award."

The RFP provided for evaluation of proposals under both general criteria, including past and present performance on recent government contracts, proposed prime contractors and significant subcontractors/team members, and specific technical criteria, listed in descending order of importance as: (1) the offeror's response to a required SSTO design exercise, in which its SSTO design would be evaluated to assess the offeror's design and analysis capability and its familiarity with SSTO technology; (2) ability to explore alternative SSTO concepts and recommend a preferred concept; and (3) availability of appropriate technology, facilities, financial resources and other means to reduce development risk, as well as the offeror's experience in the integration of various technologies and its manufacturing capability. The solicitation advised that cost would be a substantial factor in the evaluation, though less important than technical considerations.

SDIO received six proposals by the July 2, 1990 closing date; five of the proposals, but not MMI's, were included in the competitive range. The agency determined MMI's proposal to be technically unacceptable and not susceptible of being made acceptable without substantial revision; it concluded that MMI lacked a reasonable chance for award.

With respect to the required design exercise, SDIO concluded that MMI's proposal either failed to include, or included inadequate details with respect to several required areas, including critical path technologies associated with the selected concepts supporting analysis of proposed performance characteristics, required operational facilities, and manpower and other resources required for vehicle turnaround. The agency found that in its discussion of the exploration of alternate design concepts (the initial task under the contract) MMI emphasized its already selected concept to such an extent as to call into question its commitment to comply with the SOW requirement that it recommend a preferred concept only after a thorough examination of alternate concepts. Further, although the solicitation required offerors to demonstrate their access to appropriate technology in general, and their familiarity with SSTO technology in particular, the agency found that MMI's proposal provided only a limited discussion of current technologies, and did not display a capability to evaluate new technologies. In addition, SDIO determined that MMI had failed to discuss in detail its approach to the management and reduction of the risk associated with its preferred concept. SDIO further found that MMI lacked existing computer-aided-design, test and manufacturing capabilities, and had referenced proposed subcontractor facilities that were still under construction.

SDIO concluded that MMI had not demonstrated in its proposal that it had the capability to meet the requirements in the follow-on phases to develop and launch the technology demonstrator and the experimental prototype and, therefore, that award to MMI would involve an unacceptably high degree of risk. While MMI proposed a lower price (\$2,240,000) than the other offerors (whose initial prices ranged from \$2,399,756 to \$3,000,000), in view of the technical deficiencies in MMI's proposal, SDIO questioned the viability of MMI's price; the agency concluded that revising the proposal to render it acceptable would likely result in a significant increase in cost. SDIO subsequently held discussions with the five offerors remaining in the competitive range; it then made awards to four of them (Boeing Aerospace & Electronics, General Dynamics, Rockwell International Corp., and McDonnell Douglas) on August 13. MMI thereupon filed an agency-level protest; after a debriefing on September 13 and the denial of its agency-level protest, MMI filed this protest with our Office.

MMI argues, for the first time in its comments on the agency report, that it was improper for the agency to evaluate MMI's capability to perform the follow-on phases, because the follow-on phases were to be obtained under separate procurements. This argument is untimely.

Under our Bid Protest Regulations, a protest against alleged solicitation improprieties must be filed no later than the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990). It was proper for the agency to consider offers' capabilities to perform the follow-on phases because the RFP clearly required the contractor to be capable of performing those later phases. Again, the instructions in the cover letter to the RFP stated that "although this solicitation is primarily for the Phase I Study, offerors must have the ability to develop and launch the Technology Demonstrator and the Experimental Prototype to be considered for award." (Underlining added.) Further, in a response to a potential offeror's question, which was incorporated into the solicitation by amendment, SDIO warned that:

"The SSTO program involves much more than an evaluation study and requires the use of proven manufacturing and test facilities, not only a few experienced technical personnel. Offerors must have the ability to develop and launch the Technology Demonstrator and the Experimental Prototype to be considered for award."

In addition to these general statements regarding offerors' follow-on phase capability, the evaluation criteria specifically provided for consideration of manufacturing capability, which clearly goes beyond the engineering, design, and analysis capabilities which were the focus of Phase I. The evaluation therefore was consistent with the terms of the RFP. If MMI believed its capability to perform the follow-on phases should not be part of the evaluation, it was required to protest these solicitation provisions prior to the July closing date for receipt of proposals. Because it did not do so, this aspect of its protest is untimely and will not be considered.

Alternatively, MMI contends that it in fact can acquire the ability to perform the follow-on phases as demonstrated by "letters of commitment" from potential subcontractors, which it submitted with its proposal.

In reviewing complaints about the evaluation of a technical proposal and the resulting determination of whether the proposal is within the competitive range, our function is not to reevaluate the proposal and independently judge its merits.

Educational Computer Corp., B-227285.3, Sept. 18, 1987, 87-2 CPD ¶ 74. Rather, procuring officials have a reasonable degree of discretion in evaluating proposals and we will determine only whether the evaluation was unreasonable or otherwise in violation of the procurement laws and regulations. Id. Offers that are technically unacceptable as submitted and would require major revision to become acceptable are not required to be included in the competitive range for discussion purposes. BioClean Med. Sys., Inc., B-239906, Aug. 17, 1990, 90-2 CPD ¶ 142.

Based upon our review of the record, we find that SDIO reasonably determined that MMI did not demonstrate in its proposal the required ability to perform the follow-on phases, that is, the ability to manufacture and launch the technology demonstrator and experimental prototype.

The solicitation advised offerors that the evaluation would consider the availability of appropriate technology, facilities, manufacturing capability, personnel and experience. Although MMI estimated that the development and acquisition costs of the SSTO program would exceed \$1 billion and could exceed \$6 billion, it indicated in its proposal that, having previously performed contracts primarily at its customers' facilities, it currently was operating from two residences of its president until it could lease property and construct facilities. While MMI's proposal also included expressions of interest from several larger companies, the proposal generally did not include a detailed description of the specific facilities, equipment and personnel the potential subcontractors were committed to supplying. Further, MMI stated that the manufacturing facilities proposed for fabricating crucial SSTO components, including components to be tested as part of the Phase I risk reduction segment, were still under construction, and the proposed parts fabricator, in its letter of interest, appeared to condition its participation upon changing the contract from a firm-fixed-price-type contract to a cost-reimbursement-type contract.


In addition, MMI's proposal indicated that the firm was still investigating the availability of required test equipment and facilities, and that the wind tunnel it proposed to use was under renovation (although expected to be finished in time for Phase II). Moreover, as noted by the agency, MMI as a company lacked relevant experience, and while it proposed some experienced personnel, the agency noted that its technical personnel resources were quite limited, consisting primarily of part-time consultants. In these circumstances, we find that SDIO reasonably determined that a high risk existed that MMI would be unable to perform the follow-on development, manufacturing, and launch phases.

Although MMI argues that it in fact can acquire the necessary resources, and has supplied additional details as to the expected contributions of its proposed subcontractors, an offeror must affirmatively demonstrate the merits of its proposal in the proposal itself, and it runs the risk of rejection if it fails to do so. Vista Video Cassette Servs., Inc., B-230699, July 15, 1988, 88-2 CPD ¶ 55. MMI's proposal did not affirmatively demonstrate its ability to perform the subsequent phases of the SSTO program; rather, the proposal in this regard amounted to little more than a blanket offer of compliance, which is insufficient to satisfy a solicitation requirement for detailed information an agency deems necessary for evaluation purposes. Commission Professional and Hospital Activities, B-228924, Dec. 29, 1987, 87-2 CPD ¶ 637.

As the solicitation established the ability to perform the subsequent phases as a requirement for receiving the award for Phase I, and MMI's proposal did not demonstrate the required ability and would require major revision to be made acceptable in this regard, SDIO reasonably excluded MMI from the competitive range. See W.N. Hunter & Assocs.; Cajal Defense Support Co., B-237259; B-237259.2, Jan. 12, 1990, 90-1 CPD ¶ 52.

The protest is dismissed in part and denied in part.



 James F. Hinchman  
General Counsel